

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

V.

LUIS SERGIO MORALES-VILLAPUDUA,

Defendant.

The defendant, Luis Sergio Morales-Villapudua, is under indictment on one count of Deported Alien Found Unlawfully in the United States, a violation of 8.U.S.C. § 1326. The matter before the court is Morales's Motion to Dismiss Based on a Prior Unlawful Deportation (#18), in which he contends that the order mandating his removal from the United States was obtained in violation of his due process rights. Therefore, according to Morales, it cannot now be used to sustain an element of an illegal reentry offense. The government filed a Response (#19) arguing, among other things, that there could be no due process violation because Morales was ineligible for relief from removal as a result of prior aggravated felony convictions.

On June 6, 1990, Morales was charged in an Information in the District Court for Clark County with two felonies: burglary and battery with use of a deadly weapon. Attachment to Response (#19) at 1-2. Five days later, an amended Information was filed in the same case charging Morales with felony attempted coercion, to which he pled guilty on September 17, 1990. *Id.* at 3-6. On April 9, 1992, Morales was charged by felony indictment in the Superior Court of Mojave County, Arizona, with

1 transportation of marijuana for sale and possession of marijuana for sale (eight pounds or more). *Id.*
2 at 7-8. Morales pled guilty to the possession charge and on September 28, 1992 was sentenced to six
3 years in prison. *Id.* at 9-12.

4 On November 6, 1992, the Immigration and Naturalization Service initiated deportation
5 proceedings against Morales based on those criminal convictions. A hearing was held before an
6 immigration judge who denied Morales's application for relief from deportation on September 24, 1993.
7 *Id.* at 13-20. Morales appealed the decision to the Board of Immigration Appeals, which dismissed it
8 on the merits on February 1, 1994. *Id.* at 21-23.

9 On October 28, 2004, Morales was charged in the District Court for Clark County with three
10 felonies and a gross misdemeanor relating to criminal acts dating back to August 6, 1998. *Id.* at 24-26.
11 He pled guilty to one of the charges, possession of a firearm by ex-felon, and was sentenced on March
12 28, 2005. *Id.* at 27-28. On December 30, 2004, Morales was charged in an Amended Information in
13 the District Court for Clark County with trafficking in a controlled substance, 27.9 grams of cocaine,
14 on the basis of events which occurred on July 10, 1997. *Id.* at 31-32. He pled guilty to that charge in
15 March, 2005. *Id.* at 33-34.

16 On June 16, 2006, Morales was charged in an Indictment in the District Court for Clark County
17 with two counts of interfering with a public officer, a gross misdemeanor, arising out of an incident that
18 occurred in the state prison. *Id.* at 35-38. He was found guilty on the second count. *Id.* at 39. On
19 October 3, 2006, Immigration and Customs Enforcement ("ICE") issued a Notice to Appear against
20 Morales charging him with removability, based on allegations that he illegally entered the United States
21 in November 1998, his 2005 convictions for trafficking in a controlled substance and possession of a
22 firearm by an ex-felon, and his 2006 conviction for interfering with a public officer. Exh. A to Mot.
23 (#18). A hearing was held before an Immigration Judge on October 11, 2006, which resulted in a
24 Removal Order. Exh. B to Mot. (#18); Exh. C to Mot. (#18). He was removed from the United States
25 the next day. Exh. D to Mot. (#18).

26 Morales was subsequently located in Las Vegas on July 28, 2009. On August 5, 2009, the

1 government filed the one count Indictment (#1) at issue in the present Motion (#19). The Indictment
2 rests on the October 12, 2006 removal. Morales was detained at his initial appearance and entered a
3 plea of not guilty at his arraignment. Min. (#3); *see also* Order (#8).

4 DISCUSSION

5 Title 8, United States Code, Section 1326(a) makes it a crime for an alien to enter, attempt to
6 enter, or to be found in the United States without consent of the U.S. Attorney General after being
7 denied admission, excluded, deported, or removed. A defendant may collaterally attack a prior
8 deportation or removal to preclude the government from relying on it in a prosecution under this
9 section. § 1326(d). A defendant may challenge the validity of a deportation order if (1) he exhausted
10 any remedies that may have been available to seek relief against the order, (2) the deportation
11 proceedings at which the order was issued improperly deprived the defendant of the opportunity for
12 judicial review, and (3) the entry of the order was fundamentally unfair. *Id.* To succeed in a collateral
13 challenge, the defendant must demonstrate that his due process rights were violated by defects in the
14 underlying deportation proceeding, and that he suffered prejudice as a result of the violation. *United*
15 *States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000) (citation omitted). Morales challenges his
16 removal on the ground that his due process rights were violated because he was not told he was eligible
17 for “fast-track” voluntary departure under the Immigration and Nationality Act (“INA”) § 240B(a)
18 (codified at 8 U.S.C. § 1229c(a)). Mot. (#18) at 5.

19 An alien who has an aggravated felony conviction does not qualify for cancellation of removal
20 or for voluntary departure. §§ 1229b(a)(3), 1229c(a)(1). “Aggravated felony” is defined in 8 U.S.C. §
21 1101(a)(43). In determining whether a state conviction constitutes an aggravated felony under §
22 1101(a)(43), the court generally applies the categorical approach described in *Taylor v. United States*,
23 495 U.S. 575, 602 (1990). The categorical approach requires the court to look at the statutory definition
24 of the crime rather than the underlying factual circumstances. *United States v. De Jesus Castillo-Rivera*,
25 244 F.3d 1020, 1022 (9th Cir. 2001) (citation omitted).

26 Prior to his October 12, 2006 removal, Morales had multiple convictions which qualify as

1 aggravated felonies within the meaning of 8 U.S.C. § 1101(a)(43), thus making him ineligible for relief
2 from removal in the form of voluntary departure. Specifically, Morales's 1990 Nevada conviction for
3 felony attempted coercion, NRS 207.190, qualifies for treatment as an aggravated felony pursuant to
4 8 U.S.C. § 1101(a)(43)(F), inasmuch as it is "a crime of violence (as defined in section 16 of title 18,
5 United States Code, but not including a purely political offense) for which the term of imprisonment
6 [is] at least one year." 18 U.S.C. § 16 defines a crime of violence, in pertinent part, as "an offense that
7 has as an element the use, attempted use, or threatened use of physical force against the person or
8 property of another." NRS 207.190 fulfills this definition of a crime of violence, insofar as it makes
9 it "unlawful for a person, with the intent to compel another to do or abstain from doing an act which
10 the other person has a right to do or abstain from doing, to [u]se violence or inflict injury upon the other
11 person or any of his family, or upon his property, or threaten such violence or injury" and provides for
12 a sentence of one to six years. Morales was sentenced to 18 months in prison for his conviction under
13 NRS 207.190 on charges that he used physical force or immediate threats thereof to compel the victim
14 to do, or to abstain from doing, what the victim had a right to do, by striking the victim about the head
15 and body with a metal pipe or wrench. The conviction thus qualifies as an aggravated felony under 8
16 U.S.C. § 1101(a)(43)(F).

17 Morales's 1992 Arizona conviction of possession of marijuana for sale and his 2005 Nevada
18 conviction for trafficking in a controlled substance qualify for treatment as "illicit trafficking in a
19 controlled substance . . . including a drug trafficking crime" pursuant to 8 U.S.C. § 1101(a)(43)(B),
20 inasmuch as the crimes necessarily meant that Morales possessed the drugs with the aim to engage in
21 "some sort of commercial dealing." *See Lopez v. Gonzalez*, 549 U.S. 47, 53 (2006) (interpreting the
22 meaning of "trafficking" for the purposes of 8 U.S.C. § 1101(a)(43)(B)); *accord Rendon v. Mukasey*,
23 520 F.3d 967, 975 (9th Cir. 2008).

24 Finally, Morales's 2005 Nevada conviction for possession of a firearm by an ex-felon qualifies
25 for treatment as an aggravated felony pursuant to 8 U.S.C. § 1101(a)(43)(E)(ii), insofar as it is "an
26 offense described in section 922(g)(1) . . . of title 18, United States Code (relating to firearms

1 offenses),” which makes it “unlawful for any person who has been convicted in any court of a crime
2 punishable for a term exceeding one year to . . . possess . . . any firearm or ammunition . . .” Morales
3 had been previously convicted of crimes for which he was confined in excess of one year when we was
4 convicted of the charge of possession of a firearm by an ex-felon. *See United States v. De Jesus*
5 *Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001) (holding state conviction of felon in possession of
6 firearm constituted an aggravated felony “as an offense described in” 18 U.S.C. § 922(g)(1)).

7 Several of Morales’s convictions predating October 2006 thus qualify as aggravated felonies,
8 precluding him from eligibility for relief from removal in the form of voluntary departure at that time.
9 It matters not that the aggravated felonies were not alleged in the October, 2006 Notice to Appear. *See*
10 *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063, 1066 (9th Cir. 2006) (holding that “due process does
11 not require inclusion of charges in the NTA that are not grounds for removal but are grounds for denial
12 of relief from removal,” reasoning that the burden of proof as to relief from removal rests with the
13 respondent). The aggravated felonies would still have precluded Morales from obtaining relief from
14 removal in the form of voluntary departure. Accordingly, no prejudice could have resulted from ICE’s
15 or the Immigration Judge’s purported failure to inform Morales that he was eligible for voluntary
16 departure.

17 RECOMMENDATION

18 Based on the foregoing, it is the recommendation of the undersigned United States Magistrate
19 Judge that Morales’s Motion to Dismiss Based on Prior Unlawful Deportation (#18) should be denied.

20 DATED this 19th day of January, 2010.

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23 **LAWRENCE R. LEAVITT**
24 **UNITED STATES MAGISTRATE JUDGE**
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